No. 97-1517

In the Supreme Court of the United States

OCTOBER TERM, 1997

MCCLATCHY NEWSPAPERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

FREDERICK L. FEINSTEIN
Acting General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

DAVID HABENSTREIT
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that an employer engages in an unfair labor practice if, after bargaining to impasse over a proposal that would give the employer absolute discretion over merit wage increases, it unilaterally grants such increases to individual employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 131 F.3d 1026. The decision and order of the National Labor Relations Board in *McClatchy Newspapers, Publisher of the Modesto Bee* (Pet. App. 25a-33a) (*Modesto Bee*), including the decision of the administrative law judge (Pet. App. 33a-45a), is reported at 322 N.L.R.B. 812. The supplemental decision and order of the Board on remand in *McClatchy Newspapers, Inc., Publisher of the Sacramento Bee* (Pet. App. 46a-71a) (*Sacramento Bee*) is reported at 321 N.L.R.B. 1386. An earlier decision of

the court of appeals, remanding *Sacramento Bee* to the Board (Pet. App. 72a-135a), is reported at 964 F.2d 1153. The initial decision and order of the Board in *Sacramento Bee* (Pet. App. 136a-146a), including the decision of the administrative law judge (Pet. App. 147a-164a), is reported at 299 N.L.R.B. 1045.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1997. The petition for a writ of certiorari was filed on March 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(5) of the National Labor Relations Act (NLRA or Act) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5); see also 29 U.S.C. 158(a)(1) (Section 8(a)(1)) (forbidding employer "to interfere with, restrain, or coerce employees in the exercise of the [collective bargaining] rights" set forth in 29 U.S.C. 157). In turn, Section 8(d) of the Act defines the duty of collective bargaining to include "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d); see also 29 U.S.C. 159(a) (discussing union representation "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment").

The National Labor Relations Board (NLRB or Board)—the agency to which Congress has delegated responsibility for implementing the Act—has long held that an employer violates its duty to bargain

in good faith when, instead of bargaining, it takes unilateral action with respect to the "mandatory" subjects of collective bargaining set forth in Section 8(d): "wages, hours, and other terms and conditions of employment." See *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962). At the same time, the Board has generally permitted an employer, once it has bargained to impasse with a union, to implement its final proposals on such subjects. See, *e.g.*, *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), enforced *sub nom. AFTRA Kansas City Local* v. *NLRB*, 395 F.2d 622 (D.C. Cir. 1968). "The unilateral change doctrine, and the exclusion[s] * * * from the scope of that doctrine, represent the Board's interpretation of the NLRA requirement that parties bargain in good faith." *Litton Fin. Printing Div., Litton Bus. Sys., Inc.* v. *NLRB*, 501 U.S. 190, 200 (1991); see also *Katz*, 369 U.S. at 743.

2. a. Local union affiliates of the Newspaper Guild (Guild or union) represent separate units of employees of the Sacramento Bee and Modesto Bee newspapers, each of which is owned by petitioner. Pet. App. 2a-4a. At the close of negotiations for a new collective bargaining agreement for each newspaper, petitioner proposed, and the union rejected, a scheme under which all (or virtually all) wage increases would be merit increases and management would retain absolute discretion over the amount of such increases and the criteria by which they would be awarded. *Id.* at 2a-4a, 26a, 49a. After negotiations reached impasse, the Company posted its merit pay plans and granted individual merit increases to employees without prior consultation with the union. *Id.* at 3a, 4a, 49a.

After the union filed charges, the NLRB's General Counsel issued a complaint with the Board alleging,

inter alia, that petitioner's unilateral and individualized wage increases at the Sacramento Bee violated Sections 8(a)(5) and (1) of the Act. Pet. App. 3a-4a, 147a, 152a. (The General Counsel subsequently filed a similar complaint with respect to petitioner's unilateral wage actions at the Modesto Bee. See *id.* at 3a-4a, 7a; see also note 1, *infra*.) An administrative law judge found that petitioner had violated Sections 8(a)(5) and (1), see Pet. App. 147a-164a, and, on review, the Board agreed. The Board first determined that the Company's proposal was a mandatory subject of bargaining, as to which petitioner could lawfully bargain to impasse. *Id.* at 136a-137a, 140a & n.7. The Board further found, however, that, in proposing that it be given unlimited discretion over the timing and amount of merit increases, petitioner "was in reality seeking," yet had not obtained, "the Union's waiver of its statutory right to be consulted over those matters under Section 8(a)(5) and (1)." *Id.* at 141a. The Board held that petitioner's unilateral implementation of that proposal was thus a violation of the "waiver" requirement. *Id.* at 141a-142a.

b. In a brief per curiam opinion, the court of appeals denied enforcement and remanded for further consideration. Pet. App. 73a-74a. In separate opinions, Judges Edwards and Silberman agreed that the Board's decision could be consistent with the Act, but concluded, for different reasons, that the Board had failed to provide adequate justification for that decision. Judge Edwards believed that the Board's "waiver" theory was untenable, but suggested that the Board could justify its ultimate policy by recognizing a narrow exception to its general rule permitting an employer to implement its proposals on mandatory subjects of bargaining after negotiating to

impasse. *Id.* at 74a-124a. Judge Silberman would have held that the Board's waiver theory could constitute a reasonable interpretation of the NLRA, but expressed the view that the Board had not adequately explained that theory. *Id.* at 124a-132a. In partial dissent, Judge Henderson would have simply denied enforcement without a remand. *Id.* at 133a-135a.

3. a. On remand, the Board reaffirmed that petitioner's wage proposal is a mandatory subject of bargaining, that petitioner had a right to bargain over that subject to impasse, and that, as a general matter, an employer is free to implement its proposals on mandatory subjects of bargaining after impasse. Pet. App. 46a-71a. The Board concluded, however, that "preservation of the integrity of the collective-bargaining process requires that we recognize a narrow exception to the implementation-upon-impasse rules, at least in the case of wage proposals, such as the one at issue here, that confer on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees' rates of pay." *Id.* at 53a.

The Board explained that, were it to hold otherwise, petitioner's "open-ended, intermittent disruption of collective bargaining by means of the implementation of a proposal for repeatedly shifting wage rates with no objective basis and without the Guild's participation fully bypasses the Guild in its role as employee bargaining representative. Such a result would be antithetical to our statutory system of collective bargaining meant to promote industrial stability." Pet. App. 64a-65a. In so ruling, the Board noted that "we are preserving an employer's right to bargain to impasse over proposals to retain management discretion over merit pay while, at the same time, main-

taining the Guild's opportunity to negotiate terms and conditions of employment." *Id.* at 66a. The Board also emphasized that "nothing in our decision precludes an employer from making merit wage determinations if *definable objective procedures and criteria* have been negotiated to agreement or to impasse." *Id.* at 64a (emphasis added).[1]

b. On consolidated petitions for review and cross-applications for enforcement, the court of appeals upheld the portion of the Board's orders at issue here. Pet. App. 1a-24a. The court held that neither the NLRA nor this Court's precedent gives employers any absolute statutory right to implement final bargaining proposals upon impasse, and that the Board remained free to recognize exceptions to its "implementation upon impasse" rule in cases where rigid application of that rule would undermine the process of collective bargaining. The exception recognized in this case, the court held, constitutes a reasonable exercise of the Board's "wide latitude to monitor the bargaining process." *Id.* at 11a. In particular, the court agreed that the Board could reasonably conclude that implementation of the discretionary merit pay proposals "might well irreparably undermine [the

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[1] Member Cohen dissented from the Board's decision. See Pet. App. 68a-71a. The Board's principal ruling, described in the text, related to petitioner's wage actions at the Sacramento Bee. The Board subsequently extended that ruling to petitioner's wage actions at the Modesto Bee. See *id.* at 25a-45a. The Board noted that, for present purposes, the only distinction between those two aspects of this litigation is that, under petitioner's proposals, merit pay increases would occur at the Modesto Bee (but not at the Sacramento Bee) at regular intervals. See *id.* at 28a-29a n.4. The Board found that distinction to be inconsequential to its analysis. See *ibid.*

union's] ability to bargain," and concluded that it was "within the Board's authority to prevent this development." *Id.* at 14a. The court of appeals emphasized, however, the narrowness of the Board's decision. In particular, it expressed "appreciat[ion of] the Board's desire to proceed cautiously" in confining the scope of its reasoning to the implementation of a totally discretionary merit pay system. *Id.* at 20a.

ARGUMENT

The decision below, which upheld a limited exception to the Board's general "implementation upon impasse" policy, was correct. Moreover, as the court of appeals observed, that decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore not warranted.

1. The task of "effectuat[ing] national labor policy" by "striking th[e] balance" among competing interests in the workplace is "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957). The Board is therefore entitled to "considerable deference" in formulating rules, through the process of adjudication, "to fill the interstices of the [Act's] broad statutory provisions," so long as those rules are "rational and consistent with the Act." *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990) (internal quotation marks omitted); accord *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 118 S. Ct. 818, 822 (1998); *Auciello Iron Works, Inc.* v. *NLRB*, 116 S. Ct. 1754, 1759 (1996).

The question here is whether the Board acted "rational[ly] and consistent[ly] with the Act" in recog-

nizing a narrow exception to its implementation-upon-impasse rule: an exception that would bar an employer from taking unilateral action to grant discretionary merit wage increases to individual employees without articulating any standards governing the amount of the increases or the criteria for awarding them. The court of appeals correctly answered that question in the affirmative. The "implementation upon impasse" rule is not, as petitioner insists, a rigid employer right "emanating from the framework of the NLRA." Pet. 13. Indeed, nothing in the Act compels adherence to that rule, much less any particular version of it. See Pet. App. 9a & n.2. The rule is instead the product of the Board's authority "to fill the interstices of the [Act's] broad statutory provisions," *Curtin Matheson*, 494 U.S. at 786 (internal quotation marks omitted), and the Board's determination of the rule's precise contours is therefore entitled to "considerable deference," *ibid.* See also *Brown* v. *Pro Football, Inc.*, 518 U.S. 231, 242 (1996) ("The labor laws give the Board, not antitrust courts, primary responsibility for policing the collective-bargaining process.").

As a general matter, the Board has given the rule broad applicability because it has found that an employer's unilateral implementation of its final proposals upon impasse often "moves the [collective-bargaining] process forward." Pet. App. 14a. The Board reasonably determined here, however, that unilateral implementation of petitioner's unusual and wholly discretionary wage proposals would not move the collective bargaining process forward, although it would of course place economic pressure on the union. Instead, such unilateral measures would short-circuit the collective bargaining process altogether by pro-

moting standardless employer actions with respect to individual employees, without any union involvement, on the critical issue of wages. *Id.* at 62a-66a; cf. *id.* at 15a n.5.[2] And it would impair the union's ability to bargain knowledgeably about wages because, in future negotiations, there would no longer be any "fixed, objective status quo as to the level of wage rates" from which the parties could bargain, *id.* at 63a, and the union would therefore have to negotiate in the face of what the court of appeals aptly called a "discretionary cloud." *Id.* at 14a. That result, the Board reasonably found, would threaten a principal objective of the NLRA: protecting the integrity of the collective bargaining process. *Id.* at 64a-65a; see also *Charles D. Bonanno Linen Serv., Inc.* v. *NLRB*, 454 U.S. 404, 412 (1982) (because "impasse is only a temporary deadlock or hiatus in negotiations which in almost all cases is eventually broken," there is "little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways") (internal quotation marks omitted).

2. There is no merit to petitioner's contention (Pet. 14-16) that the Board's decision conflicts with *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952), and *Insurance Agents' International Union* v. *NLRB*, 361 U.S. 477 (1960). In *American National Insurance*, this Court held that it is not categorically unlawful for an employer to bargain for

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[2] The court of appeals correctly rejected petitioner's claim, which petitioner renews here in passing (see Pet. 21-22), that the Board had not adequately explained the basis for its decisions in this case. See Pet. App. 19a-21a. In particular, the court properly deferred to the Board's position on the centrality of wages in the collective-bargaining process. See *id.* at 20a.

a "management rights" clause reserving to its own discretion such matters as work scheduling. 343 U.S. at 409.[3] But the Court did not address, and had no cause to address, the circumstances in which an employer may unilaterally implement a proposal after it has lawfully bargained to impasse. Here, the Board's decision relates only to that latter issue; the Board has *not* restricted the kinds of proposals over which petitioner may bargain to impasse. See Pet. App. 17a-18a.[4] And, despite petitioner's contrary suggestion (see Pet. 14-20), nothing in *American National Insurance* or this Court's other precedent prevents the Board from looking at the substance of a proposal to determine whether unilateral implementation of that proposal upon impasse would threaten to derail the collective bargaining process. Indeed, as the court of appeals observed, "the Board often considers substance when regulating process," as petitioner itself has acknowledged. Pet. App. 18a.

Insurance Agents is inapposite as well. In that case, the Court concluded that the duty to bargain in good faith did not bar a union from promoting a work slow-down and similar on-the-job activities designed to induce the employer to reach a quick resolution of

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[3] As the court of appeals observed, the disretionary wage proposal that petitioner seeks to implement here is, for present purposes, quite unlike the proposal at issue in *American National Insurance*, for it is implausible to "imagine employee's pay—in *any* industry—being described as a subject of a *management functions* clause." Pet. App. 16a.

[4] For the same reason, and despite the contrary suggestion of amicus Council on Labor Law Equality (Br. 7-9), the Board's decision here is entirely consistent with *Struthers Wells Corp.* v. *NLRB*, 721 F.2d 465 (3d Cir. 1983), and *NLRB* v. *Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978).

disputed issues. 361 U.S. at 478-500; see also 29 U.S.C. 158(b)(3). As the court of appeals recognized (Pet. App. 12a-13a), however, *Insurance Agents* does not require the Board to ignore the "unique character" (361 U.S. at 488) of particular tactics that, unlike ordinary economic weapons, imperil the process of collective bargaining. To the contrary, the Board "may deny an employer a particular economic weapon * * * in the interest of the proper and pre-eminent goal" of bargaining stability. *Bonanno Linen*, 454 U.S. at 419; see also *NLRB* v. *Katz*, 369 U.S. 736, 747 (1962). Moreover, the Board's decision here leaves intact an expansive array of economic weapons that petitioner may lawfully deploy against the union. For example, petitioner's very exercise of its right to bargain to impasse over its wage proposal places substantial pressure on the union to accede to that proposal so that employees may enjoy the benefits of a labor contract, which they may otherwise be denied altogether.

3. As the court of appeals observed (Pet. App. 19a), the decision below does not conflict with *Colorado-Ute Electric Ass'n* v. *NLRB*, 939 F.2d 1392 (10th Cir. 1991), cert. denied, 504 U.S. 955 (1992). In that case, the Tenth Circuit invalidated a ruling by the Board that the "waiver" doctrine (see generally p. 4, *supra*; Pet. App. 105a-112a) precluded an employer from implementing a merit pay proposal after impasse. The court reasoned that the Board has long recognized an "implementation upon impasse" right, citing *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), enforced *sub nom. AFTRA Kansas City Local* v. *NLRB*, 395 F.2d 622 (D.C. Cir. 1968); that recognition of such a right is "[c]onsistent with the Act"; and that application of the Board's "waiver" theory to qualify

that right "is fundamentally at odds with the NLRB's own statement of the law with respect to mandatory subjects of bargaining." 939 F.3d at 1404.

The D.C. Circuit itself rejected the same waiver analysis in an earlier stage of this case (see Pet. App. 72a-135a), but that holding did not prevent the D.C. Circuit from affirming the modified position adopted by the Board on remand (see *id.* at 8a-19a). If the issue were ever to reappear in the Tenth Circuit, that court could well follow the same course, despite petitioner's insistence (Pet. 12 & n.8) that an isolated phrase in the concluding paragraph of *Colorado-Ute* would compel a different result. Indeed, because the Tenth Circuit focused its analysis on the Board's "waiver" doctrine, it had no occasion to consider the precedential significance of this Court's decision in *Bonanno Linen*, which held that "assessing the significance of impasse and the dynamics of collective bargaining is precisely the kind of judgment that * * * should be left to the Board." 454 U.S. at 413. In any event, as the D.C. Circuit explained, *Colorado-Ute* is distinguishable on the independent ground that the Tenth Circuit characterized the proposals at issue there as involving identifiable standards for granting wage increases, while the decision below is expressly confined to the unusual case in which a merit pay proposal lacks *any* "objective criteria." See Pet. App. 18a-19a.

Finally, it is noteworthy that petitioner cites only two court of appeals decisions (*Colorado-Ute* and the decision below) addressing the lawfulness of an employer's implementation of merit wage proposals upon impasse. The absence of other decisions addressing that subject indicates that the question presented here has limited recurring significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FREDERICK L. FEINSTEIN
Acting General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

DAVID HABENSTREIT
Attorney
National Labor Relations Board

MAY 1998